BAUER (MALAYSIA) SDN BHD v. JACK-IN PILE (M) SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
HAMID SULTAN ABU BACKER JCA
RHODZARIAH BUJANG JCA
[CIVIL APPEALS NO: B-02(C)(A)-1187-06-2017 &
B-02(C)(A)-1188-06-2017]
22 FEBRUARY 2018

CONSTRUCTION LAW: *Adjudication – Setting aside – Payment claims – Mode of payment – 'Pay when paid' clause in construction agreement – Section 35 of Construction Industry Payment and Adjudication Act 2012 ('CIPAA 2012') outlawed 'pay when paid' clauses – Applicability of s. 35 to contract which existed before CIPAA 2012 came into force – Whether jurisdiction of adjudicator circumscribed by stricture of CIPAA 2012 – Whether CIPAA 2012 intended to have retrospective operation – Whether legislation relating to substantive right and ought to be given prospective effect – Whether adjudicator a creature of legislation – Whether adjudicator exceeded jurisdiction*

STATUTORY INTERPRETATION: *Construction of statute – Intention of Parliament – Construction Industry Payment and Adjudication Act 2012 ('CIPAA 2012') – Whether a legislation relating to substantive right and ought to be given prospective effect – Whether CIPAA intended to have retrospective operation – Whether jurisdiction of adjudicator circumscribed by strictures of CIPAA 2012*

The respondent was awarded with a subcontract by the appellant for a project ('the project'). The employer of the project was ITD Vertex Consortium ('ITD Vertex') which was subsequently wound up. The appellant lodged its proof of debt with the liquidator of ITD Vertex and the amount included the amounts, certified and uncertified, claimed by the respondent. Payment claims by the respondent had stalled in view of the predicament of ITD Vertex and this consequently gave rise to payment disputes between the parties. Premised on the disputes, the respondent commenced adjudication proceedings under the Construction Industry Payment and Adjudication Act 2012 ('CIPAA 2012') against the appellant. The construction contract contained cl. 11.1, a classic 'pay when paid' clause. It was undisputed between the parties that the mode of payment prior to the adjudication process had been as provided in cl. 11 in that the appellant had no obligation to pay the respondent until payment had been received from ITD Vertex. During the adjudication proceedings, the CIPAA 2012 had become law and there was a specific provision outlawing the 'pay when paid' clauses *via* s. 35. The crucial dispute in the adjudication process was the applicability of s. 35 of the CIPAA 2012 to the construction contract between the appellant and the respondent which had existed prior to the CIPAA 2012 came into force. The adjudicator found that s. 35 of the CIPAA 2012 applied

and consequently ignored cl. 11 and relied on the right of 'progress payment' mode in determining whether the appellant was liable to the respondent and awarded the respondent a certain sum. The appellant filed an application to set aside the adjudication decision pursuant to s. 15 of the CIPAA 2012. The respondent also took out an application to enforce the same pursuant to s. 28 of the CIPAA 2012. The High Court sustained the application for enforcement of the adjudicator's decision and dismissed the application to set aside the adjudicator's decision by the appellant. Thus, these appeals. The appellant took the stand that there had been an excess of jurisdiction on the part of the adjudicator when he voided cl. 11 premised on the applicability of s. 35 of the CIPAA 2012. The respondent, however, argued that the role of the courts in an adjudication matter must not delve into the merits of the decision of the adjudicator even when the adjudicator had erred on a point of law.

Held (allowing appeals)
Per David Wong Dak Wah JCA delivering the judgment of the court:

(1) The jurisdiction of an adjudicator is circumscribed by the stricture of the CIPAA 2012 and if therein there are provisions which define the limitation of the adjudicator's jurisdiction, the court must view the same as jurisdiction markers. Any extension of power of an adjudicator by the CIPAA 2012 concerns the jurisdiction of the adjudicator which squarely comes within the fourth ground of s. 15 of the CIPAA 2012. (para 22)

(2) The applicability of s. 35 of the CIPAA 2012 depends on whether the CIPAA 2012 was intended to have a retrospective operation. Unless there are clear words in the legislation to the contrary, any legislation affecting substantive rights must be given a prospective effect. Similarly, if the legislation is procedural in nature, that legislation must be given a retrospective effect unless clear words in the same show to the contrary. If the legislation does not take away any substantive rights of the citizens of the State, then that legislation would be only 'procedural' in nature. (paras 23, 26 & 27)

(3) Access to justice is in anyone's view a substantive right. Here, the CIPAA 2012 has created and given a new avenue of access to justice to claimants in the construction industry. Hence, the CIPAA 2012 is in essence a legislation relating to a substantive right. Within the CIPAA 2012 there exists a procedural regime dictating as to how claims are to be processed before the adjudicator. The procedural regime was nothing but a by-product or the consequence of the substantive right created by the CIPAA 2012. (para 29)

(4) In the context of s. 35, it relates to a substantive right of an individual. That substantive right is nothing less than the right to freedom of contract where parties are entitled to regulate their business affairs subject to any prohibitions recognised by law. Section 35 in essence

takes away the right of the parties to have their payment regime regulated by a 'pay when paid' mode. Here, there was no dispute that prior to the adjudication process, the respondent only received payments when the appellant had been paid by ITD Vertex. Hence, it was unfair that the respondent could now rely on s. 35 of the CIPAA 2012 to void cl. 11 of the construction contract. (para 30)

(5) Parliament would not take away the entrenched right of an individual retrospectively unless with clear words within the statute. There were no such clear words in the CIPAA 2012. That being the case, the CIPAA 2012 is prospective in nature. In so far as s. 35 was concerned, cl. 11 of the construction contract remained afoot and valid. As this was related to the jurisdiction of the adjudicator, he had exceeded his jurisdiction when he ignored cl. 11 of the construction contract. Where there is an excess of jurisdiction, the courts must intervene for the simple reason that the adjudicator is a creature of legislation and his or her powers are strictured by it. (paras 31, 32 & 34)

Bahasa Malaysia *Headnotes*

Responden diberikan subkontrak oleh perayu untuk sebuah projek ('projek'). Majikan projek adalah ITD Vertex Consortium ('ITD Vertex') yang kemudiannya digulung. Perayu mengemukakan bukti hutang dengan pelikuidasi ITD Vertex dan jumlah termasuk jumlah-jumlah, diperakui dan tidak diperakui, dituntut oleh responden. Tuntutan pembayaran oleh responden terhenti memandangkan keadaan ITD Vertex dan berikutan itu pertikaian-pertikaian bayaran antara pihak-pihak terlibat timbul. Berdasarkan pertikaian-pertikaian tersebut, responden memulakan prosiding adjudikasi bawah Akta Pembayaran Dan Adjudikasi Industri Pembinaan 2012 ('CIPAA 2012') terhadap perayu. Kontrak pembinaan mengandungi kl. 11.1, satu klausa yang klasik iaitu 'bayar apabila dibayar'. Tidak dipertikaikan pihak-pihak bahawa cara pembayaran sebelum proses adjudikasi telah diperuntukkan dalam kl. 11 di mana perayu tidak mempunyai obligasi untuk membayar responden sehingga bayaran diterima oleh ITD Vertex. Semasa prosiding adjudikasi, CIPAA 2012 menjadi undang-undang dan dalamnya terdapat peruntukan spesifik mengharamkan klausa-klausa 'bayar apabila dibayar' melalui s. 35. Pertikaian penting dalam proses adjudikasi tersebut adalah pemakaian s. 35 CIPAA 2012 dalam kontrak pembinaan antara perayu dan responden yang wujud sebelum penguatkuasaan CIPAA 2012. Adjudikator mendapati bahawa s. 35 CIPAA 2012 diguna pakai dan seterusnya mengabaikan kl. 11 dan bergantung pada hak cara 'pembayaran berperingkat' dalam menentukan sama ada perayu bertanggungjawab kepada responden dan mengawardkan responden jumlah tertentu. Perayu memfailkan permohonan mengetepikan keputusan adjudikasi menurut s. 15 CIPAA 2012. Responden juga membuat permohonan untuk menguatkuasakan yang sama menurut s. 28 CIPAA 2012. Mahkamah Tinggi mengekalkan permohonan penguatkuasaan keputusan

adjudikator dan menolak permohonan pengetepian keputusan adjudikator oleh perayu. Oleh itu, rayuan-rayuan ini. Perayu mengambil pendirian bahawa terdapat kelampauan bidang kuasa dari pihak adjudikator apabila beliau membatalkan kl. 11 berdasarkan pemakaian s. 35 CIPAA 2012. Responden pula menghujahkan peranan mahkamah dalam perkara-perkara adjudikasi tidak perlu menyelidiki merit keputusan adjudikator walaupun adjudikator terkhilaf atas hujahan undang-undang.

Diputuskan (membenarkan rayuan-rayuan)
Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:

(1) Bidang kuasa adjudikator dibatasi oleh striktur CIPAA 2012 dan jika terdapat peruntukan-peruntukan yang mendefinisikan pengehadan bidang kuasa adjudikator, mahkamah harus mengambil kiranya sebagai penanda bidang kuasa. Sebarang peluasan kuasa adjudikator oleh CIPAA 2012 berkait dengan bidang kuasa adjudikator yang terangkum dalam alasan keempat s. 15 CIPAA 2012.

(2) Pemakaian s. 35 CIPAA 2012 bergantung pada sama ada CIPAA 2012 diniatkan untuk mempunyai satu operasi retrospektif. Melainkan terdapat kata-kata yang jelas dalam perundangan yang bertentangan, apa-apa perundangan mempengaruhi hak-hak substantif harus diberikan kesan prospektif. Begitu juga, jika perundangan adalah prosedural, perundangan harus diberikan kesan retrospektif melainkan kenyataan-kenyataan menunjukkan sebaliknya. Jika perundangan tidak memisahkan hak substantif daripada rakyat, perundangan itu hanyalah bersifat 'prosedural.'

(3) Akses pada keadilan adalah satu hak substantif. Di sini, CIPAA 2012 telah mewujudkan dan membuka akses untuk keadilan kepada penuntut-penuntut dalam industri pembinaan. Oleh itu, CIPAA 2012 pada dasarnya adalah perundangan berhubungan hak substantif. Dalam CIPAA terdapat rejim prosedural yang menetapkan bagaimana tuntutan harus diproses di hadapan adjudikator. Rejim prosedural hanyalah hasil sampingan atau implikasi hak substantif yang diwujudkan oleh CIPAA 2012.

(4) Dalam konteks s. 35, ia berhubungan hak substantif pihak individu. Hak substantif itu adalah hak kebebasan kontrak di mana pihak-pihak berhak mengawal hal ehwal mereka tertakluk pada mana-mana larangan yang diiktiraf undang-undang. Seksyen 35 pada asasnya mengambil hak pihak-pihak untuk mendapatkan rejim bayaran yang dilaraskan oleh cara 'bayar apabila dibayar.' Di sini, tiada pertikaian bahawa sebelum proses adjudikasi, responden hanya menerima bayaran-bayaran apabila perayu dibayar oleh ITD Vertex. Oleh itu, tidak adil jika responden sekarang bergantung pada s. 35 CIPAA 2012 untuk membatalkan kl. 11 kontrak pembinaan.

(5) Parlimen tidak akan mengambil hak seorang individu secara retrospektif melainkan terdapat kata-kata jelas dalam statut. Tiada kata-kata jelas sebegitu dalam CIPAA 2012. Dengan itu, CIPAA 2012 bersifat prospektif. Berkenaan s. 35, kl. 11 kontrak pembinaan kekal berjalan dan sahih. Oleh kerana ini berkaitan dengan bidang kuasa adjudikator, beliau telah melampaui bidang kuasanya apabila beliau mengabaikan kl. 11 kontrak pembinaan. Apabila terdapat kelampauan bidang kuasa, mahkamah-mahkamah harus campur tangan kerana adjudikator adalah ciptaan perundangan dan kuasa-kuasanya disekat.

Case(s) referred to:

ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Appeal [2016] 1 LNS 1522 CA ***(refd)***

Carillion Construction Ltd v. Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358 ***(refd)***

UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor And Another Case [2015] 5 CLJ 527 HC ***(refd)***

Legislation referred to:

Construction Industry Payment and Adjudication Act 2012, ss. 15, 28, 35, 36(1)

Other source(s) referred to:

Andrew Burr, *International Contractual and Statutory Adjudication*, footnote 10, p 221

Francis Bennion's Statutory Interpretation, 5th edn, p 316

Maxwell's Interpretation of Statutes, 12th edn, p 216

NS Bindra's Interpretation of Statute, 8th edn, pp 768-769

For the appellant - Sanjay Mohan & Adam Lee; M/s Mohanadass Partnership
For the respondent - Rohan Arasoo & Amy Hiew; M/s Harold & Lam Partnership

[Editor's note: For the High Court judgment, please see Jack-In-Pile (M) Sd Bhd v. Bauer (Malaysia) Sdn Bhd & Another Appeal [2017] 1 LNS 1270 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

David Wong Dak Wah JCA:

Introduction

[1] There are two appeals before us and they are heard together as they emanated from one decision in which the learned judge dismissed the appellant's application to set aside an adjudication decision and allowed the enforcement of the aforesaid adjudication decision by the respondent. The said decision was premised on a finding that the "paid when pay" clause in a construction contract was void by virtue of s. 35 of Construction Industry Payment and Adjudication Act 2012 (CIPAA 2012).

[2] We heard the appeals and had reserved on decision we have since considered further submission from respective counsel and now give our decision grounds.

Background Facts

[3] The respondent was awarded with a subcontract by the appellant for a project known as "Cadangan Membina 3 Blok 39 Tingkat 689 Unit Rumah Pangsa Kos Tinggi dan 23 Unit Kedai 2 Tingkat yang mengandungi Kemudahan Tadika, Dewan Serbaguna, Surau serta 4 Tingkat Podium Tempat Letak Kereta & Rekreasi dengan 1 Tingkat Basemen di atas Lot P.T. 3901, HS (D) 61423, Jalan Aman Fasa III (Kg Berembang), Mukim Ulu Klang, Daerah Gombak, Selangor Darul Ehsan" for the supply and installation of Spun Piles for a contract sum of RM1,850,000.

[4] The employer of the project was one ITD Vertex Consortium (ITD Vertex). Unfortunately, ITD Vertex was wound up in 2012 and this was informed to the respondent by the appellant who had also assured that steps would be taken to recover monies from ITD Vertex to pay the respondent. In 2013, the appellant lodged its proof of debt with the liquidator of ITD Vertex and the amount included the amounts, certified and uncertified, claimed by the respondent.

[5] Naturally, payment claims by the respondent had stalled in view of the predicament of ITD Vertex and this consequentially gave rise to payment disputes between the parties.

[6] Premised on the disputes, the respondent on 23 August 2016 commenced adjudication proceeding under CIPAA 2012 against the appellant.

Decision Of The Learned Adjudicator

[7] The central dispute before the learned adjudicator was the applicability of s. 35 of CIPAA 2012 *vis a vis* of cl. 11.1 of the construction contract.

[8] Clause 11.1 of the construction contract reads as follows:

> **11.0 Progress Payment**
>
> 11.1 All payments shall be made within 7 days from the date the Specialist Contractor received their related progress payment and subjected to 5% retention. The Sub-Contractor shall submit his claims with measurement records of work done including demarcated sketches and/or delivery orders (where applicable), duly endorsed by the Specialist/Main Contractor's and Consultants authorised site staff. The cut-off date for the progress claim shall be on 20th day of each calendar month.

One can safely say that the aforesaid clause is a classic "pay when paid" clause. It is also undisputed between parties that the mode of payment prior to the adjudication process had been as provided in cl. 11 in that the appellant had no obligation to pay the respondent until payment had been received from the ITD Vertex.

[9] During the adjudication proceeding, CIPAA 2012 had become law and in it there is a specific provision outlawing the "pay when paid" clauses. That provision is s. 35 which reads as follows:

> 35. Prohibition of Conditional Payment
>
> (1) Any conditional payment provision in a construction contract in relation to payment under the construction contract is void.
>
> (2) For the purposes of this section, it is a conditional payment provision when:
>
> (a) The obligation of one party to make payment is conditional upon that party having received payment from a third party; or
>
> (b) The obligation of one party to make payment is conditional upon the availability of funds of drawdown of financing facilities of that party.

[10] The crucial dispute in the adjudication process was the applicability of s. 35 of CIPAA 2012 to the construction contract between the appellant and respondent which had existed prior to the CIPAA 2012 which came into force in 15 April 2014.

[11] The appellant's position was simple, and it was that if s. 35 of CIPAA 2012 did not apply, then there was no obligation to pay the respondent as it was undisputed that ITD Vertex had not paid them. The position of the respondent was also simple and it was that cl. 11 had been outlawed so to speak and the appellant cannot seek cover under the same.

[12] The learned adjudicator on 23 November 2016 delivered his decision in which he found that s. 35 of CIPAA 2012 applied and consequently ignored cl. 11 and relied on the right of "progress payment" mode in determining whether the appellant was liable to the respondent. Having determined the liability of the appellant, the learned adjudicator awarded the respondent a sum of RM906,034.

[13] In response to the decision of the learned adjudicator, the appellant filed an application to set aside the said adjudication decision pursuant to s. 15 of CIPAA 2012.

[14] The respondent also took out an application to enforce the same pursuant to s. 28 of CIPAA 2012.

High Court Decision

[15] The learned judge in her grounds on the applicability of s. 35 of CIPAA 2012 said as follows:

> [12] It was this Court's finding that clause 11 being a conditional payment clause had been rendered void by section 35 CIPAA which clearly states "any conditional payment provision in a construction contract in relation to payment ... is void". CIPAA including section 35 applies retrospectively

and this Court can do no better than refer to *UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor* [2015] 5 CLJ 527 where it was stated at pages 552-553, 557-558 and 576 as follows:

> [160] For this, I return to the ethos of CIPAA. Since it is to provide a speedy procedure for the temporary resolution payment disputes in construction contracts through the introduction of a fresh or a new forum called 'adjudication', it would be appropriate to say that such legislation is in character, truth and substance, procedural and adjectival legislation. Such legislation or statute is presumed in law to be applied retrospectively unless there is clear contrary intention in the statue itself ...;
>
> [173] ... Hence, CIPAA which provides adjudication as an alternative forum for payment dispute resolution as opposed to resorting to the court and arbitration, a liberal and purposive interpretation must be adopted in relation to CIPAA. In so doing, the choice of an additional forum of resolution should surely be offered to all unless there is clear provision that it is not. Since there are no such provisions to allow for such an interpretation, CIPAA is retrospective insofar as the construction contract are concerned; and that would include the present construction contracts before the court.; and
>
> [225] It is therefore the conclusion of this court that it is the clear intention of Parliament that CIPAA applies to all construction contracts regardless of when those construction contracts were made; and that would extend to the payment disputes that arise under those construction contracts. The Act applies so long as the construction contracts are made in writing and that such construction contracts are carried out either wholly or partly within the territory of Malaysia. The only exception to this are those payment disputes where proceedings in relation to such disputes have already been commenced either by way of court proceedings or arbitration before the operation of the Act, that is, before 15 April 2014.

[16] Premised on the above, the learned judge sustained the application for enforcement of the adjudicator's decision and dismissed the application to set aside the adjudicator's decision by the appellant.

Our Grounds Of Decision

[17] Learned counsel for the appellant takes the stand that there has been an excess of jurisdiction on the part of the learned adjudicator when he voided cl. 11 premised on the applicability of s. 35 of CIPAA 2012. Hence his reliance on s. 15 CIPAA 2012 which only allows limited grounds for the court to set aside and one of which relates to excess of jurisdiction.

[18] Opposing this contention, learned counsel for the respondent puts his contention as follows. The role of the courts in an adjudication matter must not delve into the merits of the decision of the adjudicator even when the

adjudicator had erred on a point of law. In support of that contention, we are referred to the case of *Carillion Construction Ltd v. Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358 where it was held by Chadwick LJ:

> [85] The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should only be in rare circumstances that the courts will interfere with the decision of an adjudicator …
>
> [86] It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels "excess of jurisdiction" or "breach of natural justice". It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the need of the case. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or sub-contractor) or his sub-contractors will be driven to insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash flow requirements of contractors and their subcontractors. The need to have the "right" answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions. Indeed, it may be open to doubt whether Parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under the statutory scheme …

[19] It is also pointed out to us that the aforesaid case was adopted by this court in the case of *ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd and Another Appeal* [2016] 1 LNS 1522; [2016] MLJU 1776 where it was held as follows:

> [23] We express full agreement with what was said and further adopt it as the correct approach in our jurisdiction.
>
> [24] This was simply a case where the losing party was not happy that it had obtained an unfavourable decision and tried its chance in the judicial system. The law as it exists now correctly limits the Court's functions which expressly do not include the review of the correctness of the adjudicator's decision. As pointed by the learned judge, the Court's intervention is only in very exceptional circumstances which are far and few in between. The *prima facie* view of the Court must be to affirm the adjudicator's decision unless the losing party can show that it has complied with the thresholds listed in section 15 of CIPAA 2012.

[20] We have no issue with the legal principle that the court's role in adjudication matters in the context of CIPAA 2012 is very limited and they are set out in s. 15 CIPAA 2012 which only provides four grounds:

(i) An adjudication decision procured through fraud or bribery.

(ii) There had been a denial of natural justice.

(iii) The adjudicator had not acted independently or impartially.

(iv) The adjudicator had acted in excess of jurisdiction.

[21] It is our considered view that we are not dealing with a situation where the learned adjudicator had merely wrongly interpreted a clause of the construction contract. If that was so, we agree that the parties will have to live with that error of law. But what we have here is more than that and it is whether a provision in a statute of law applied to the construction contract with the result of voiding a clause therein.

[22] The jurisdiction of an adjudicator is circumscribed by the stricture of CIPAA 2012 and if therein are provisions which define the limitation of the adjudicator's jurisdiction, the court must view the same as jurisdiction markers. In the context of this appeal, we are dealing with s. 35 which, as pointed out earlier, outlaws "pay when paid" clauses and hence an adjudicator is given the power to ignore such clauses and determine the liability of the non-paying party on other causes of action. Such extension of power of an adjudicator by CIPAA 2012, in our view, concerns the jurisdiction of the adjudicator which squarely comes within the fourth ground of s. 15 CIPAA 2012. With that, we move to the crucial issue of the applicability of s. 35 of CIPAA 2012 to the construction contract at hand.

[23] The applicability of s. 35 of CIPAA 2012 depends, in our view, whether CIPAA 2012 was intended to have a retrospective operation. Regretfully there is no express provision in CIPAA 2012 excluding or including construction contracts made prior to the commencement of CIPAA 2012. In the circumstances, we are left with the task of seeking out the intention of Parliament and in doing that task we seek refuge or help from the established principles of interpreting statutes.

[24] There is a legal principle of interpretation known as the "Rule of Beneficial Construction". The learned author in *Maxwell's Interpretation of Statutes*, 12th edn, p. 216 describes it as follows:

> One of the most well- known statements of rule regarding retrospectively is contained in this passage from the judgment of RS Wright J in *Re Athlumney* (1898) 2 QB 511 at purchase price 551-552:
>
> > Perhaps no rule of construction is more firmly established than thus – that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided

A without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.

The rule has, in fact, two aspects, for it, "involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary.

[25] In *Francis Bennion's Statutory Interpretation*, 5th edn, the learned author at p. 316 in similar vein states as follows:

The essential idea of legal system is that current law should govern current activities. Elsewhere in this work a particular Act is likened to a floodlight switched on or off, and the general body of law to the circumambient air. Clumsy though these images are, they show the inappropriateness of retrospective laws. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of law. Dislike of *ex-post facto* law is enshrined in the United States Constitution and in the Constitution of many American States, which forbid it. The true principle is that *lex prospicit non respicit* (law looks forward no back). As Willes, J. said retrospective legislation is 'contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future act, and ought not to change the character of past transaction carried on upon the faith of the then existing law.

[26] Another tool of interpretation of statute is this. Unless there are clear words in the legislation to the contrary, any legislation affecting substantive rights must be given a prospective effect. Similarly, if the legislation is procedural in nature, that legislation must be given a retrospective effect unless clear words in the same show to the contrary. (see *NS Bindra's Interpretation of Statute*, (8th edn) at pp. 768-769).

[27] The principle distilled from the aforesaid principles of law is that if the legislation does not take away any substantive rights of the citizens of the State, then that legislation would be only "procedural" in nature and can be interpreted as a retrospective legislation unless there are clear words to the contrary. Hence, the question before us then is whether CIPAA 2012 gives rise to "substantive rights".

[28] What then are substantive rights? Prior to CIPAA 2012, claimants in the construction industry can only resort to either the courts or arbitral tribunal to settle their disputes. So to speak, access to the courts and arbitral tribunals were the only legal rights available to the claimants to claim for their contractual fees. With the advent of CIPAA 2012, the claimants now have an additional avenue to claim for their contractual fees. CIPAA 2012 has in effect created a new regime in which claimants in the building industry can claim their contractual fees.

[29] Access to justice is in anyone's view a substantive right. Here, CIPAA 2012 has created and given a new avenue of access to justice to claimants in the construction industry. Hence, CIPAA 2012 is in essence a legislation relating to a substantive right. We are fully aware that within CIPAA 2012 there also exists a procedural regime dictating as to how claims are to be processed before the adjudicator. The procedural regime is nothing but a by-product or the consequence of the substantive right created by CIPAA 2012.

[30] In the context of s. 35, we are also of the view that it relates to a substantive right of an individual. That substantive right is nothing less than the right to freedom of contract where parties are entitled to regulate their business affairs subject, of course, to any prohibitions recognised by law. Section 35 in essence takes away the right of the parties to have their payment regime regulated by a "pay when paid" mode. Here, there is no dispute that prior to the adjudication process, the respondent only received payments when the appellant had been paid by ITD Vertex. Hence, the contention by learned counsel for the appellant that it is totally unfair that the respondent can now rely on s. 35 of CIPAA 2012 to void cl. 11 of the construction contract.

[31] There is also a presumption when interpreting statutes and that is that Parliament will not take away the entrenched right of an individual retrospectively unless with clear words within the statute. As we are aware, there are no such clear words in CIPAA 2012. That being the case, there is no hesitation on our part to conclude that CIPAA 2012 is prospective in nature. In so far as s. 35 is concerned, cl. 11 of the construction contract remains afoot and valid.

[32] As this relates to the jurisdiction of the learned adjudicator, we with respect say that he had exceeded his jurisdiction when he ignored cl. 11 of the construction contract.

[33] In view of the decision, we, with respect, take a different view to the rationale expressed by the learned judge in *UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor And Another Case* [2015] 5 CLJ 527. In saying this, we find support from the learned author, *Andrew Burr*, who in his book, *International Contractual and Statutory Adjudication* in footnote 10 at p. 221 had also expressed the view that CIPAA 2012 is not a 'procedural legislation'. He premised his reasoning on s. 36(1) of CIPAA 2012 which allows parties to contract out of the "progress payment" regime. In the view of the learned author, such right to contract out is not consistent with the spirit and intention of CIPAA 2012 which is "pay now argue later" and therefore he opines that the phrase "unless otherwise agreed by parties" in s. 36(1) ought to be deleted to reflect such spirit and intention.

A

Conclusion

[34] Setting aside a decision of an adjudicator can be done under limited circumstances as provided in s. 15 and the courts will only interfere in exceptional circumstances. In our view, that is the correct approach in the context of CIPAA 2012 which is a regime where "pay now and argue later" is the prevailing principle. However, when there is an excess of jurisdiction, the courts must intervene for the simple reason that the adjudicator is a creature of legislation and his or her powers are strictured by it.

B

[35] In this case, the learned adjudicator voided cl. 11 of the construction contract which as pointed out should not have been done. By doing so, he had exceeded his jurisdiction.

C

[36] In the circumstances, we allow the two appeals with agreed costs of RM10,000 subject to payment of allocator fees. We also set aside the orders of High Court and that of the learned adjudicator. The deposits of the appeals are also refunded to the appellant.

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